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IN THE

Supreme Court of the United States

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*,

Petitioners,

—and—

SHAFIQ RASUL, *et al.*,

Petitioners,

—v.—

UNITED STATES, *et al.*,

Respondents,

—and—

GEORGE W. BUSH, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE INTERNATIONAL COMMISSION OF JURISTS AND THE AMERICAN ASSOCIATION FOR THE INTERNATIONAL COMMISSION OF JURISTS, AMICI CURIAE, SUPPORTING PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici Curiae consist of the International Commission of Jurists (ICJ) and its American section, the American Association for the International Commission of Jurists (AAICJ). The mission of the ICJ, a non-governmental organization based in Geneva, Switzerland, is to promote the understanding and observance of the rule of law and the legal protection of human rights throughout the world. The ICJ is comprised of 60 jurists of high standing in their own country or at the international level. The Commission meets on a biennial basis and elects an Executive Committee of seven members, which, in turn, meets twice a year. The Executive Committee appoints the Secretary General who is responsible for the daily work of the ICJ Secretariat.

Operations are financed in substantial part by a range of governments. The ICJ also receives funding from private foundations, including several American foundations, as well as private individuals. It enjoys consultative status with the United Nations Economic and Social Council, the African Union and the Council of Europe.

The ICJ promotes the rule of law through the work of its Secretariat in Geneva and its 82 sections and affiliates throughout the world. The AAICJ has been composed over the years of senior members of the American Bar as well as distinguished members of the judiciary and academia. Financially independent from the Secretariat, the AAICJ conducts its own programs according to its own resource base.

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[1] The parties' written consents to the filing of this brief have been filed with the clerk. No counsel for any party has authored this brief in whole or in part, and no person other than amici curiae and their legal counsel made any monetary contribution to its preparation and submission.

These proceedings involve aliens captured abroad during hostilities in Afghanistan and held in United States military custody at the Guantanamo Naval Base in Cuba. The Court of Appeals below affirmed the District Court's dismissal of the proceedings in these dockets in which the parties had filed pleadings which alleged, among other things, that the refusal of the government (i) to inform them of the charges, if any, against them, (ii) to allow them to meet with their families and with counsel, and (iii) to grant them access to any impartial tribunal, military or civilian, to review the basis of their detentions violates the Constitution, federal law and regulations, and treaties of the United States. The ICJ and the AAICJ believe that the decisions by the lower courts in these proceedings raise serious questions concerning the role of the judiciary in protecting the rule of law. Therefore the ICJ and the AAICJ, pursuant to Rule 37, respectfully submit this brief in support of the position advanced by Petitioners Fawzi Khalid Abdullah Fahad Al Odah, *et al.* and Shafiq Rasul, *et al.*

SUMMARY OF ARGUMENT

These proceedings raise the serious question of whether the Courts below have abdicated their essential role in protecting the rule of law in the American system of government. The most basic requirement of the rule of law is access to an independent, competent, and impartial tribunal established by law. At the heart of the concept of "due process of law" is the requirement that any executive detention be subject to judicial review. These principles apply equally when the United States is at peace or at war. While the U.S. military authorities may or may not have an adequate legal basis for detaining the petitioners in Guantanamo Bay, it is essential that the Executive not make that determination alone. While great respect is due to the military during wartime in prosecuting matters

related to the war, there are limits to the discretion to be accorded the military, particularly in areas having to do with the deprivation of liberty which are the traditional province of the judiciary. The military's claims must be subjected to judicial process.

The decision of the Court of Appeals is also inconsistent with basic principles of international law. All major human rights instruments establish standards for the propriety of detention. These standards universally prohibit arbitrary arrest and require the availability of judicial review of any detention.

The decision of the Court of Appeals cannot be squared with these principles. If the Court's interpretation of *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950) were correct, U.S. officials could arrest foreign nationals and, by the simple device of transferring them outside the sovereign territory of the United States, defeat the jurisdiction of the United States Courts.

The arbitrary detention of the detainees at Guantanamo Bay in violation of basic principles of due process and the standards of all major human rights conventions also undermines the rule of law in the international community. Instead of being a champion of the rule of law, the United States has become an example that can be used by other nations to justify the arbitrary detention of their own citizens. Moreover, in addition to undermining the rule of law in other nations, the conduct of the United States government makes it much more difficult for the ICJ and similar human rights organizations to succeed in their mission of promoting basic principles underlying the rule of law in the international community.

ARGUMENT

A. The Decision of the Court of Appeals Is Not Consistent With the Rule Of Law.

The most fundamental guarantee of the liberty of the American people is the rule of law. The *Universal Declaration of Human Rights*[2] emphasizes the critical relationship between the rule of law and the protection of human rights:

> *Whereas* it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

This Court has stressed the central importance of this principle in American democracy from its earliest decisions. As Chief Justice Marshall declared in *Marbury* v. *Madison*, 5 U.S. 137, 163 (1803), "The government of the United States has been emphatically termed a government of laws, and not of men."

Although the rule of law has a number of components, the most basic requirement is access to an impartial, competent and independent tribunal established by law.[3] In his dissent in *Shaughnessy* v. *Mezei*, 345 U.S. 206, 218-228 (1952), in which the Court denied a writ of

[2] U.N.G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948).

[3] In a recent law review article, a U.S. Court of Appeals Judge set forth the following summary of the elements that most scholars believe make up the rule of law: " . . . (1) capacity of legal rules, standards or principles to guide people in the conduct of their affairs; (2) efficacy; (3) stability; (4) *supremacy of legal authority, even over governmental officials (including judges)*; and (5) *instrumentalities of impartial justice (that is, courts that use fair procedures)*. Diane P. Wood, *The Rule of Law in Times of Stress*, 70 *U. Chi. L. Rev.* 455 (2003) (emphasis added).

habeas corpus sought by an alien excluded from the United States on security grounds, Justice Jackson declared that access to the courts of law is one of the most important safeguards in the Constitution:

> Fortunately, it is still startling, in this country to find a person indefinitely in executive custody without accusation of crime or judicial trial . . . Procedural fairness and regularity are of the indispensable essence of liberty. . . Because the respondent had no rights of entry, does it follow that he has no rights at all? Does the power to exclude mean that exclusion may be continued or effectuated by any means which happen to seem appropriate to the authorities? . . . When indefinite confinement becomes the means of enforcing exclusion, it seems to me that due process requires that the alien be informed of its grounds and have a fair chance to overcome them . . . It is inconceivable to me that this measure of simple justice and fair dealing would menace the security of this country. No one can make me believe that we are that far gone.

Access to the courts of law is equally important when the nation is at peace and at war. As Justice Davis famously declared in *Ex Parte Milligan*, 71 U.S. 2, 120 (1866):

> The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine

> involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during the great exigencies of government. Such a doctrine leads directly to anarchism or despotism . . .

While great respect is due to the military during wartime in matters relating to the prosecution of the war, there are limits to the discretion to be accorded to the military, particularly in areas having to do with the deprivation of liberty which are the traditional province of the judiciary. It is particularly important that any claims of the military be subjected to the judicial process. Justice Murphy explained the critical role of the judiciary in balancing constitutional rights and military discretion in his dissent in *Korematsu* v. *U.S.*, 323 U.S. 214, 233-234 (1944):

> In dealing with matters relating to the prosecution and progress of a war, we must accord great respect and consideration to the judgment of the military authorities who are on the scene and have full knowledge of the military facts . . . At the same time, however, it is essential that there be definite limits to military discretion, especially where martial law has not been declared. Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support. Thus, like other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled.

These principles are consistent with basic standards of international law. Almost all major human rights conventions establish standards for the propriety of detention. These standards universally prohibit arbitrary arrest and require the availability of judicial review of any executive detention. The *Universal Declaration of Human Rights* declares that: "No one shall be subjected to arbitrary arrest, detention or exile." [4] In addition, Article 10 emphasizes the necessity of access to an independent tribunal,

> Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.[5]

The International Covenant on Civil and Political Rights (ICCPR), to which the United States is a party, is equally emphatic in declaring that arbitrary detention is inconsistent with fundamental human rights:

> Everyone has a right to liberty and security of person. No one shall be subjected to arbitrary arrest and detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.[6]

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[4] Article 9, *Universal Declaration of Human Rights*, adopted by the U.N. General Assembly, Dec. 10, 1948, U.N.G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948).

[5] Article 10, *Universal Declaration of Human Rights*, adopted by the U.N. General Assembly, Dec. 10, 1948, U.N.G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948).

[6] Article 9, *International Covenant On Civil and Political Rights*, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

As a safeguard against arbitrary executive detention, the ICCPR also emphasizes, in a fashion similar to the *Universal Declaration of Human Rights*, the importance of speedy access to an independent and impartial judiciary to determine whether there are legal grounds for the detention:

> Article 9(4): "Anyone deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."
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> * * * * * * * *
>
> Article 14(1): " . . . In the determination of any criminal charge against him, or of rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."[7]

The obligations established by the ICCPR are not intended to be limited to a state's territory. The extraterritorial application of the ICCPR has been recognized by the Human Rights Committee, the body created by the ICCPR to monitor its implementation. In its concluding observations on Israel, the Human Rights Committee stated:

> The Committee is deeply concerned that Israel continues to deny its responsibility to apply the Covenant in the occupied

[7] Articles 9(4) and 14(1), *International Covenant on Civil and Political Rights* (ICCPR), Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

> territories. . . The Committee is therefore of the view that . . . the Covenant must be held applicable to the occupied territories and those areas of southern Lebanon and West Bank where Israel exercises effective control.[8]

On Nov. 3, 2003, the Human Rights Committee issued an interpretation of the ICCPR which reaffirmed the general extraterritorial application of the rights established under the Covenant:

> State Parties are required by article 2, paragraph 1, to respect and ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party . . . [T]he enjoyment of Covenant rights is not limited to citizens of State Parties but must also be available to all individuals, regardless of

[8] *Concluding Observations of the Human Rights Committee: Israel*, 18 August 1998, U.N. Doc. CCPR/C/79/Add. 93, par. 10. The Human Rights Committee later re-emphasized these views concerning the obligations of Israel in the occupied territories: "The Committee therefore reiterates that, in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all of the conduct by the State party's authorities and agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law." *Concluding Observations of the Human Rights Committee: Israel*, 21 August 2003, UN Doc. CCPR/CO/73/ISR, par.11.

> nationality or statelessness, such as asylum seekers, refugees, migrant workers, and other persons, who may find themselves within the territory, or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained . . .[9]

These fundamental human rights are also recognized in many regional human rights conventions. The *European Convention for the Protection of Human Rights and Fundamental Freedoms* provides:

> Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.[10]

The *American Convention on Human Rights*, in the same fashion, prohibits arbitrary detention, and requires that any person detained shall be immediately brought before a judge to determine the lawfulness of his arrest.[11]

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[9] *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, Nov. 5, 2003, U.N. Doc. CCPR/C/74/CRP.4/Rev 4, par. 9.

[10] Article 5(4), *European Convention For the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 213 U.N.T.S. 221.

[11] Articles 7(3), (5), and (6), *American Convention on Human Rights*, Nov. 22, 1969, 1144 U.N.T.S. 123.

The international agencies charged with enforcement of these conventions have emphasized that the right to judicial review of executive detention cannot be suspended even during national emergencies. For example, the Inter-American Commission of Human Rights (IACHR) has stated:

> . . . Should a terrorist situation give rise to an emergency that threatens a state's independence or security, that state is nevertheless precluded from suspending certain fundamental aspects of the right to liberty and personal integrity . . . These protections . . . include appropriate judicial review mechanisms to supervise detentions, promptly upon arrest or detention and at appropriate intervals when detention is extended.[12]

In addition, the IACHR has indicated that certain basic rights must be observed when detaining individuals:

> There are components to the right to liberty that can never be denied, including underlying principles that law enforcement authorities must observe in making an arrest even during an emergency . . . These include the requirement that the grounds and procedures for the detention be prescribed by law, the right to be informed of the reasons for the detention, as well as certain guarantees against prolonged *incommunicado* or indefinite detention, including access to legal counsel, family

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[12] *Report on Terrorism and Human Rights*, O.A.S. Doc. OEA/ Ser. L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, par. 139.

> and medical assistance following arrest, [and] prescribed and reasonable limits upon the length of preventive detention . . . [13]

The decision of the Court of Appeals is contrary to the rule of law as enunciated in both these international conventions and basic principles of American jurisprudence. Relying principally on *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), the Court of Appeals held that "constitutional rights. . . are not held by aliens outside the sovereign territory of the United States, regardless of whether they are enemy aliens" and therefore that, "no court in this country has jurisdiction to grant habeas relief, under 28 U.S.C. § 2241, to the Guantanamo detainees." *Odah, et al.* v. *United States*, 321 F.3d 1134, 1140-1141 (D.C. Cir. 2003). If the Court's interpretation of *Johnson* v. *Eisentrager* were correct, U. S. officials could arrest foreign nationals and, by the simple device of transferring such prisoners to a place of detention outside the sovereign territory of the United States, defeat the jurisdiction of the United States Courts to review the legality of their detention. The U.S. Executive could arbitrarily hold such individuals in detention with no accountability to any court of law. The ICJ and the AAICJ do not assert that the U.S. Executive may not have an adequate legal basis for holding the individuals involved in this proceeding in detention. Rather, they contend that the rule of law requires that such determination must be made by a court of law and not by the Executive alone. The balancing of the government's military claims against the claims of the detainees is constitutionally committed to the Courts and not to the Executive.

[13] *Report on Terrorism and Human Rights*, O.A.S. Doc. OEA/ Ser. L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, par. 127.

B. The Decision of the Court of Appeals Undermines the Mission of the ICJ And Similar Human Rights Organizations in Promoting the Rule of Law.

Historically, the United States' traditions of the rule of law, human rights, and democracy have been respected in the international community. It has always been – and still is - the proud boast of the United States that it stands for these principles in the community of nations. For example, the National Security Strategy of the United States, issued in September, 2002, states:

> In pursuit of our goals, our first imperative is to clarify what we should stand for: the United States must defend liberty and justice because these principles are right and true for all people everywhere . . . America must stand firmly for the nonnegotiable demands of human dignity: the rule of law; [and] limits on the absolute power of the state . . . We will champion the cause of human dignity and oppose those who resist it.

The decision of the Court of Appeals that the rule of law does not apply to the detainees of Guantanamo Bay diminishes the reputation of the United States as a champion of the rule of law. There are already disturbing signs that other nations have begun to use the example of the United States to justify arbitrary detention of their citizens. For example, Malaysia's Law Minister has justified the detention of militants without trial stating that its practice was "just like the process at Guantanamo Bay." Sean Yoong, *Malaysia Slams Criticism of Security Law Allowing Detention Without Trial*, Assoc. Press, September 17, 2003. The minister further indicated that he "put the

equation with Guantanamo Bay just to make it graphic to you that this is not simply a Malaysian style of doing things." Egypt, Cameroon, and a number of other African countries have also moved to detain individuals perceived as threats to national security. "The insistence by the Bush administration on keeping Taliban and Al Qaeda captives in indefinite detention in Guantanamo Bay, instead of jails in the United States – and the White House's preference for military tribunals over regular courts – helps create a free license for tyranny in Africa." Shehu Sani, *U.S. Actions Send a Bad Signal to Africa: Inspiring Intolerance*, *Int'l Herald Trib.*, Sept. 15, 2003.

When the United States deprives the Guantanamo Bay detainees of their liberty without due process of law, it undermines the rule of law in the international community and makes it much more difficult for the ICJ and similar human rights organizations to succeed in their mission of promoting basic principles underlying the rule of law. For example, the ICJ engages in numerous efforts to carry out this mission. It intervenes with governments in particular cases of harassment of jurists. It sends observers to trials which may affect judicial independence or in which lawyers are targeted. It coordinates fact-finding missions to countries where the function of the judiciary is under serious threat and also publishes country reports documenting cases of harassment and persecution of judges and lawyers throughout the world.

In promoting the rule of law through programs such as these, the ICJ and similar human rights organizations should always be able to point to the United States as an example of a nation that respects both the rule of law and the role of the judiciary in safeguarding the rule of law. The holding of the detainees at Guantanamo Bay in arbitrary detention – without access to the courts and counsel – deprives the world of such an example.

CONCLUSION

The United States is a nation founded upon a tradition of individual liberty and democracy. The most significant safeguard of individual liberty is the rule of law. It is the responsibility of the judiciary in the American system of government to assure the survival of the rule of law. It is, therefore, particularly important that this Court reaffirm the role of the judiciary in safeguarding the rule of law both when the country is at peace and at war. The judgment below should be reversed.

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